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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/758,282	01/16/2004	Jeremy S. Cooper	2018.0050001/JSW	5141

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EXAMINER	
EL HADY, NABIL M	

ART UNIT	PAPER NUMBER
2152	

DATE MAILED: 07/05/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/758,282	COOPER ET AL.	
	Examiner	Art Unit	
	Nabil M. El-Hady	2152	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *16 January 2004*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *14-28* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *14-28* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date *10/22/2004*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

1. Claims 1-28 are pending in this application. Claims 1-14 are cancelled. Claims 15-28 are new. Claims 15-28 are presented for examination.

2. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

3. Claims 15-28 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-13 of U.S. Patent No. 6,681,255, hereinafter "255". Although the conflicting claims are not identical, they are not patentably distinct from each other because both the instant application and "255" are directed to a method and system of receiving data over a network at a target bandwidth by calculating a wait time and delaying the data transmitted with an amount of the wait time in order to satisfy the target bandwidth. Independent claims 15, 21, and 25 of the instant application cite the same limitations in claims 1 and 9 in "255". The cited limitations in the dependent claims of the instant application are cited in the dependent claims of "255".

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

4. Claims 15, 16, 21, 24, 25, and 28 are rejected under 35 U.S.C. 102(e) as being anticipated by Mogul (US 6,560,243).

5. As to claims 15 and 21, Mogul discloses the invention as claimed including a system and method for retrieving data over a network at a target bandwidth, the method comprising: transmitting a request for data to a server over the network and receiving the data from the server over the network (col. 4, lines 10-20); calculating a wait time based on the target bandwidth (col. 2, lines 30-32); waiting the calculated wait time, transmitting a request for additional data to the server over the network after waiting the calculated wait time; and receiving the additional data from the server over the network (col. 2, lines 30-41; and Fig. 4).

6. As to claim 25, the claim is rejected for the same reasons as claims 14 and 21 above. In addition, a computer program product comprising a computer useable medium having computer program logic recorded thereon for enabling a processor to retrieve data over a network at a target bandwidth is inherent in Mogul's disclosure.

7. As to claim 16, Mogul discloses repeating waiting the calculated wait time, transmitting a request for additional data to the server over the network after waiting the calculated wait time; and receiving the additional data from the server over the network (col. 2, lines 30-41; and Fig. 4).

8. As to claims 24 and 28, Mogul discloses the network is the Internet (col. 3, lines 6-9).

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

10. Claims 17-20, 22-23, and 26-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mogul.

11. As to claims 17-20, 22, 23, 26, and 27 Mogul discloses a wait time calculated based on bandwidth calculations (col. 2, lines 30-32). Mogul does not explicitly disclose determining a start time, current time, and byte count to calculate the wait time. However, it should be obvious to one skilled in the art at the time of the invention that bandwidth calculations is usually based on bytes count and time, and different computations can be done in any number of ways using these parameters: bandwidth, bytes count and time. Any of these computation would use a start time at the initiation of the retrieval of data, detecting or counting a number of bytes received, increment an aggregate byte count by the number of bytes received, calculating a current time, and subsequently calculating a wait time. If the wait time should be zero, then elapsed time (time now – start time) should equal total bytes divided by bandwidth. Obviously a wait time should be added to the elapsed time when the bytes count is not the total but the aggregate count.

12. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Sherer et al. (US 5,875,175); Reynolds (US 6,791,943); Guetz et al. (US 6,091,777).

13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nabil M. El-Hady whose telephone number is (571) 272-3963. The examiner can normally be reached on 9:00 - 4:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Follansbee can be reached on (571) 272-3964. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

June 30, 2005

Nabil El-Hady, Ph.D, M.B.A.
Primary Patent Examiner
Art Unit 2152